Beverly Health and Rehabilitation Services, Inc., its Operating Regional Offices, wholly owned subsidiaries and individual facilities and each of them and/or its wholly owned subsidiary Beverly Enterprises-Pennsylvania, Inc. ***and*** **Pennsylvania Social Services Union Local 668, affiliated with Service Employees International Union, AFL–CIO, CLC** ***and*** **District 1199P, Service Employees International Union, AFL–CIO, CLC** ***and*** **Service Employees International Union, Local 585, AFL–CIO, CLC.** Cases 6–CA–28130–1, 6–CA–28130–2, and 6–CA–28130–3

September 28, 2001

ORDER DENYING MOTIONS

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 8, 2000, the National Labor Relations Board issued its Decision and Order in this case,[1] finding that the November 29, 1996 complaint allegation that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a defamation lawsuit against the Charging Parties and District 1199P President Thomas DeBruin should be held in abeyance pending the outcome of the lawsuit. Additionally, the Board's Decision and Order dismissed the allegation in the December 23, 1996 amended complaint to the extent that it alleged that the Respondent violated the Act by failing to stay its lawsuit after the General Counsel issued his November 29, 1996 complaint in this case.

On October 6, 2000, the General Counsel and the Charging Parties filed motions for reconsideration and supporting memoranda. Subsequently, the Respondent filed a brief in opposition to the motions, the General Counsel filed a reply brief, and the Charging Parties filed a reply memorandum.

The General Counsel's motion seeks reconsideration solely of the Board's finding that the Respondent's defamation lawsuit was not preempted by issuance of the General Counsel's complaint in this case. The General Counsel seeks a finding that the lawsuit was preempted from the time of issuance of the General Counsel's complaint until the Board issued its decision in this case on August 8, 2000. The General Counsel, however, does not request the Board to find that the Respondent's maintenance of the assertedly preempted lawsuit violated the Act.

The Charging Parties' motion also seeks reconsideration of the Board's finding that the Respondent's lawsuit was not preempted by issuance of the General Counsel's complaint. The Charging Parties seek a finding that the Respondent violated the Act by its continued prosecution of the lawsuit after the General Counsel's complaint issued. Additionally, the Charging Parties request reconsideration of the Board's holding in abeyance the complaint allegation that the Respondent violated the Act by filing and maintaining its lawsuit. The Charging Parties contend that the Board erred in failing to find that the lawsuit was baseless and retaliatory and, thus, violated Section 8(a)(1) from the outset. In particular, the Charging Parties contend that the Board erred in failing to require the Respondent to come forward with some evidence supporting each element of each count of its lawsuit.

The Respondent contends that the Board's decision was correct and that the General Counsel's and Charging Parties' motions should be denied. The Respondent argues that the Board correctly followed applicable Supreme Court precedent in finding that its defamation lawsuit was not preempted by the General Counsel's issuance of the complaint in this case. Additionally, the Respondent contends that the Board properly applied the reasonable basis test in finding that the complaint allegation that the Respondent violated the Act by filing and maintaining its lawsuit should be held in abeyance.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we deny the General Counsel's and Charging Parties' motions for reconsideration for the following reasons.

1. First, the Charging Parties claim that the Board erred in holding in abeyance the complaint allegation that the Respondent violated the Act by filing and maintaining its defamation lawsuit. Their arguments were fully considered in the underlying case, 331 NLRB No. 121, in accordance with the framework set out in *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), and we see no reason to reconsider them.

2. Second, the General Counsel and the Charging Parties contend that the Board erred in finding that issuance of the General Counsel's complaint did not preempt the Respondent's defamation lawsuit. Our resolution of this issue is necessarily circumscribed by

[1] 331 NLRB No. 121.

the Supreme Court's analysis in both *Bill Johnson's* and *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). We read those cases as curbing our ability to enjoin prosecution of a defamation suit, unless and until we have determined that the suit lacked a "reasonable basis" under *Bill Johnson's*. And, contrary to the General Counsel and the Charging Parties, we do not view the Court's decision in *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), and the Board's decision in *Loehmann's Plaza*, 305 NLRB 663, 670 (1991),[2] as authorizing the Board to do more. The governing caselaw makes clear that different considerations apply to defamation suits, as opposed to trespass suits.

In *Linn*, the Supreme Court held that, where a party to a labor dispute circulates allegedly defamatory statements, a State court defamation suit is not preempted by the Act "if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55.[3] For the plaintiff to prevail, he must prove not only defamation under State law, but also the Federal overlay of actual malice and damages. Under *Bill Johnson's*, in turn, "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." 461 U.S. at 748–749.

Bill Johnson's itself involved a State court libel suit. The Court acknowledged that the Board may order a respondent to cease and desist from prosecuting a lawsuit that is preempted by Federal labor law. Id. at 737 fn. 5. However, the Court emphasized that the case before it involved a libel claim, which was *not* preempted:

> [W]hat is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption . . . . Id.

Rather, to enjoin the libel lawsuit, the Court held, the Board would have to find that it was baseless. The Court summarized its holding as follows:

> The Board's reasonable-basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. ….In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis. [Id. at 749.]

We read *Bill Johnson's* and *Linn* together to preclude the Board from finding that the General Counsel's issuance of a complaint against a defamation lawsuit preempts the State court suit, pending litigation on the "baselessness" issue. To enjoin the libel suit as preempted when the complaint issues, would be contrary to *Linn*, which held that where the plaintiff has alleged and can prove actual malice and damages, the defamation suit is *not* preempted. It would also be contrary to *Bill Johnson's*, which held that unless a State court suit is preempted, the Board cannot enjoin it unless and until the Board determines that it lacks a reasonable basis and is retaliatory. In short, contrary to the moving parties' argument, the defamation suit cannot be enjoined as soon as the complaint issues, because no determination has yet been made, by the Board, on the baselessness issue.

The General Counsel and Charging Parties argue that a different result is compelled by the Supreme Court's decision in *Sears*, supra, and the Board's later decision in *Loehmann's Plaza*, supra. We cannot agree.

In *Sears*, the Court found that a State court *trespass* lawsuit seeking to enjoin peaceful union picketing on the employer's property was not preempted by the Act. The principal reason was that "the party who could have presented the [Section 7] protection issue

[2] Supplemented by 316 NLRB 109 (1995), review denied sub nom. *Commercial Workers Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom. *Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

[3] In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court announced the general preemption principle that "state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of section 7 or the prohibitions of section 8 of the National Labor Relations Act." In *Linn*, the Court found that lawsuits for malicious defamation are not preempted by the Act, "as a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the [preemption] exception specifically carved out by *Garmon*." 383 U.S. at 62, quoting *Garmon*, 359 U.S. at 248.

to the Board [i.e., the union] ha[d] not done so and the other party to the dispute [i.e., the employer] ha[d] no acceptable means of doing so."[4] Id. at 201. The Court was thus unwilling to find the trespass suit preempted, leaving the employer without a forum in which to adjudicate its dispute with the union. The Court, however, indicated that, had the trespass dispute been presented to the Board in an unfair labor practice proceeding, the lawsuit would have been preempted.[5]

The preemption holding in *Loehmann's Plaza* followed from this proposition. *Loehmann's Plaza* involved a complaint alleging that a State law trespass suit against union handbilling and picketing violated Section 8(a)(1). The Board held that when the General Counsel issues a complaint alleging that a lawsuit constitutes unlawful interference with protected activity, the requirements for establishing preemption are met. After the point of preemption, the active pursuit of a state court lawsuit seeking to enjoin protected peaceful picketing tends to interfere with Section 7 rights thereby violating Section 8(a)(1) of the Act. The reason is that when the General Counsel issues a complaint—"[w]ith regard to the lawsuits of the kind in issue [in *Loehmann's Plaza]*," 305 NLRB at 670—he has made a determination that sufficient evidence has been presented to demonstrate a prima facie case that the union picketing or handbilling is arguably protected by the Act; that determination then satisfies the substantive requirement for preemption under *Sears*,[6] because an unfair labor practice is committed only by interference with activity that the Act protects.

Contrary to the moving parties, we do not believe that *Sears* and *Loehmann's Plaza* compel the conclusion that, once a complaint is presented to the Board involving a state court *defamation* suit, the suit should be preempted. The *Sears* court clearly drew a distinction between preemption principles in trespass cases arising out of union picketing or handbilling and defamation cases. As it stated:

> The Court has held that state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress or obstruction of access to property is not pre-empted by the NLRA. But none of those violations of state law involves protected conduct. In contrast, some violations of state trespass laws may be actually protected by § 7 of the federal Act." [436 U.S. at 204; footnotes omitted.][7]

Accord: *Longshoremen ILA v. Davis*, 476 U.S. 380, 392–393 fn. 10 (1986) (discussing exceptions to *Garmon* preemption and describing *Linn* as involving regulated conduct touching "interests . . . deeply rooted in local feeling" and *Sears* as involving "conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board").

Of course, absent a finding that the picketing and handbilling on private property is protected, a lawsuit to enjoin that activity is not unlawful. The determination whether that conduct is protected is within the exclusive province of the Board. As *Linn* makes clear, however, that is not so with an alleged defamation. Further, the Board made clear in *Loehmann's Plaza* (involving a trespass case) that the situation there was different than that in *Bill Johnson's* (involving a defamation case): "[A]t the point of preemption, the special requirements of *Bill Johnson's* do not apply." 305 NLRB at 671.[8]

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[4] Thus, unlike *Linn*, the *Sears* finding of nonpreemption was not based on the *Garmon* exception regarding conduct that touches interests deeply rooted in local feeling and responsibility. See fn. 3, above.

[5] The Justices disagreed about the precise point at which preemption would occur—when the unfair labor practice charge was filed or when the General Counsel issued his complaint. See 436 U.S. at 208–212 (Blackmun, concurring), 436 U.S. 212–214 (Powell, concurring).

[6] As the Board discussed in *Loehmann's Plaza*, the Court in *Sears* announced the following guidelines:

> (1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law. It is clear that under *Sears* preemption does not occur before an unfair labor practice charge is filed, at least so long as the landowner has communicated to the trespassers a demand that they leave before filing the trespass suit. It is also clear under *Sears* that when the Board issues a decision finding the conduct protected, the Board's decision and remedy preempts any state court action. 305 NLRB at 669 (footnotes omitted).

[7] The General Counsel, citing fn. 29 of *Sears*, argues that the decision "explains that once the Board's jurisdiction over arguably protected conduct is invoked, preemption must occur until the Board rules, because if the conduct is eventually found to be actually protected, the state court is clearly ousted of all jurisdiction." G C Br. at 8. In fact, this principle applies—as *Sears* makes clear—only where the *Garmon* doctrine is "applicable." 436 U.S. at 199 fn. 29. In defamation cases, of course, an exception to *Garmon* applies. *Linn*, 383 U.S. at 62.

[8] The Charging Parties argue that "[t]here is no difference between trespass actions and defamation actions relevant to the *Loehmann's Plaza* analysis," because "[n]either type of action is wholly preempted by federal law." Charging Parties' Memorandum at 12-13. We recognize, as we stated in our original decision, that *Bill Johnson's* makes clear that in defamation cases arising out of labor disputes, federal law superimposes a malice requirement that is a "heavy burden." 331 NLRB No. 121, slip op. at 3-4. But, as pointed out above, the Court in *Bill Johnson's* also emphasized that

For all of these reasons, we conclude that the Board may not order the Respondent to cease and desist from pursuing its defamation lawsuit unless and until it is determined by the Board to be baseless under a *Bill Johnson's* analysis.[9] We recognize that, as the General Counsel claims, the existence of concurrent proceedings before both the Board and state court on the defamation claims may present some risk of inconsistent results.[10] For example, it is theoretically possible that the Board, proceeding under a *Bill Johnson's* theory, could find a party's state defamation suit to be baseless and retaliatory in violation of Section 8(a)(1), while the State court could simultaneously find the suit meritorious. But cf. *Bill Johnson's*, supra, 461 U.S. at 749 fn. 15 (suggesting possibility of deference to state court ruling "on the question whether the lawsuit presents triable factual issues," absent reason not to defer). This possibility, however, is an inevitable consequence of the fact that both the Board and the State courts have appropriate roles to play in cases like this one. In recognizing the role of the State courts, of course, we are in no way abdicating the Board's responsibility (as the Charging Parties contend). As Justice Brennan observed in his concurring opinion in *Bill Johnson's:*

> [A]s the Court makes clear . . . the Board's ability to *enjoin* prosecution of a state suit is not the measure of its ability to determine that such prosecution constitutes an unfair labor practice or of its ability to provide other remedies to vindicate federal labor policy. [Id. at 753.]

Accordingly, the motions for reconsideration are denied.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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the defamation action before it was not "a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption." 461 U.S. at 737 fn. 5. Given that statement, we see no basis for even the sort of "jurisdictional hiatus" that the Charging Parties urge (Charging Parties' Memorandum at 14), though we certainly recognize--as did the Court in *Bill Johnson's*--that allowing the State court litigation to proceed may burden the union defendants. 461 U.S. at 740–741.

[9] However, nothing in our decision precludes the Board from authorizing the General Counsel to seek a court order, under Sec. 10(j) of the Act, to prevent an allegedly baseless defamation lawsuit from going forward in State court. Thus, the Board may decide to grant such 10(j) authorization where it appears that the lawsuit lacks a reasonable basis and is retaliatory. Therefore, although issuance of an unfair labor practice complaint alleging that a defamation lawsuit violates the Act does not preempt the suit, the General Counsel may nevertheless seek a temporary halt to such a suit under Sec. 10(j).

Chairman Hurtgen does not agree that Sec. 10(j) presents a viable means for stopping the lawsuit. Sec. 10(j) is designed to provide interim relief pending completion of proceedings before the Board. In such cases, it is anticipated that the Board will complete its proceedings as soon as possible. By contrast, in the instant case, the Board proceedings are being held in abeyance and 10(j) proceedings to stop the lawsuit would be contrary to the Board's Order. Although his colleagues also assert that 10(j) relief is available while the General Counsel litigates his case before the Board, Chairman Hurtgen notes that, in a future case like the instant case, the General Counsel would presumably follow Board law and refrain from issuing a complaint, and thus would not litigate the case before the Board. Further, to enjoin the lawsuit pending the completion of Board proceedings would be contrary to the *Linn-Bill Johnson's* rationale of the instant Board decision. That is, under *Linn-Bill Johnson's* the Board permits the lawsuit to go forward.

[10] Chairman Hurtgen does not agree with this sentence. In the first place, there will not be concurrent proceedings. The Board is essentially staying its proceeding until the lawsuit is completed. Secondly, the risk of inconsistent results is more theoretical than real. That is, it is most unlikely that the NLRB would find a defamation suit baseless, i.e., without a colorable basis, if the courts have found the suit to be not only colorable but meritorious.